LEE BOYD MALVO,	IN THE
Appellant	COURT OF APPEALS
v.	OF MARYLAND
STATE OF MARYLAND,	September Term, 2021
Appellee	No. 29

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of January, 2022, a copy of Appellant's Reply Brief was delivered via the MDEC system by arrangement with the Office of the Attorney General to:

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IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2021

NO. 29

LEE BOYD MALVO,

Appellant

v.

STATE OF MARYLAND,

Appellee

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

APPELLANT'S REPLY BRIEF

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Fifteen years ago, Judge Ryan unconstitutionally sentenced Malvo to life without parole after expressly finding that he had "changed." Malvo—a corrigible juvenile offender—must be provided a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010). The State's assertion that Malvo was found to be *incorrigible* is indefensible, especially given the prosecutor's concession that Malvo

had "grown tremendously" and "escaped" Muhammad's sway. Argument I.A, *infra*.

Malvo's sentencing was also patently inadequate under *Miller v. Alabama*, 567 U.S. 460 (2012): Judge Ryan did not even mention that he was a juvenile offender, let alone recognize that his immaturity, vulnerability to Muhammad's influence, and potential for rehabilitation weighed against life without parole. Tellingly, the State does not argue that the record reflects consideration of the "mitigating qualities of [Malvo's] youth," *id.* at 476, staking its response on an expansive reading of *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). *Jones*, however, limits what post-*Miller* judges must *say* under *Miller* without altering what all judges must *consider* under *Miller*. The record does not come close to showing that Malvo's pre-*Miller* sentencer adequately considered Malvo's youth. Argument I.B, *infra*.

Maryland sentenced Malvo to unconstitutional life-without-parole sentences. Maryland thus cannot wash its hands of Malvo's case: He must be resentenced or provided a *meaningful* opportunity for release from his Maryland sentences. The State's purported fix—JUVRA sentence review—is a hollow remedy for Malvo because he is unlikely to (1) have a JUVRA hearing and (2) receive review of *all* of his unconstitutional sentences. And unless JUVRA is rewritten—

unnecessarily—by this Court, its opportunity for modification is not "based on" demonstrated maturity and rehabilitation. Malvo must be resentenced. Argument II, *infra*.

ARGUMENT

I. Malvo's sentences are unconstitutional.

A. Malvo's sentences are disproportionate under the Eighth Amendment and Article 25 because Judge Ryan found him to be corrigible.

Miller's "substantive rule" bars life without parole for corrigible juveniles. *Montgomery v. Louisiana*, 577 U.S. 190, 208–209 (2016). Malvo's sentences are thus unconstitutional under the Eighth Amendment if he was found corrigible. The State responds that the standard for evaluating as-applied disproportionality challenges to juvenile life-without-parole sentences is an "open question" after *Jones*. State's Br. at 24. This Court should answer that question consistent with Supreme Court precedent: *Jones* held (based on express statements in *Montgomery*) that *Miller* did not require a *finding* of incorrigibility, but did not disturb *Miller*'s right to a meaningful opportunity for release for the small class of juveniles *already found* to be corrigible.[1] *See State v. Haag*, 495 P.3rd 241, 246 n.3, 251 (Wash. 2021). But this Court does not need to decide the

[1] The State accepted this premise in *Farmer v. State* (Sept. Term, 2021, No. 31), State's Br. at 52–54.

Eighth Amendment issue: Article 25 independently invalidates life-without-parole sentences imposed on corrigible juveniles. *Cf. Leidig v. State*, 475 Md. 181, 222 (2021) ("In [many] cases … upon deciding that a violation of the Maryland Constitution did occur, we have … not reached the Federal constitutional issue") (citation omitted).

A corrigible juvenile is one of the "many" juveniles with the "capacity for change." *Graham*, 560 U.S. at 77. Malvo established his "capacity for change" by satisfying the prosecutor (E.120) and court (E.128) that he had "changed." The prosecutor could not have been more emphatic: Malvo had "grown tremendously," "advanced the healing process" for the "entire community," and "escaped" Muhammad's "sway." (E.121).

The State takes an extreme position: Judge Ryan found Malvo to be "one of the *rare* juveniles that are *not* capable of rehabilitation." State's Br. at 14 (emphases added). It relies on his statement that Malvo "knowingly, willingly, and voluntarily participated" in "cowardly murders." *Id.* at 37 (quoting E.128). But this conflates the *heinousness* of a child's crime with the child's *corrigibility*. *See Montgomery*, 577 U.S. at 212 ("*Miller*'s central intuition [is] that children who commit even heinous crimes are capable of change."). Heinousness as a proxy for incorrigibility is especially untenable when the prosecutor

acknowledges that the child—who offended "under the sway of a truly evil man"—had "escaped" that influence. (E.121). Judge Ryan recognized as much by finding that Malvo had "changed," although that finding's legal significance only became apparent after *Miller*.

The State next argues that neither the prosecutor nor judge "said anything to suggest that Malvo could change or mature to the point that he would be rehabilitated[.]" State's Br. at 37. Not true: The prosecutor stated that Malvo had "escaped" Muhammad's "ideology of hate" (implying that he *already* posed less, if any, danger to society). (E.121). But more fundamentally, the Supreme Court has been clear: A child is corrigible—and entitled to a meaningful opportunity for release based on demonstrated maturity and rehabilitation—if he shows that he is "capable of change." *Montgomery*, 577 U.S. at 212; *see also Graham*, 560 U.S. at 77. Because Malvo established his capacity for change, his sentences should have provided him the opportunity to eventually demonstrate that he had been rehabilitated. Life without parole is thus disproportionate for Malvo.

Finally, if this Court is unsure whether Judge Ryan found Malvo to be corrigible, he must still be resentenced for three independent reasons. *First*, if the judge's corrigibility finding is unclear, the case should be remanded. *See Madison v. Alabama*, 139 S. Ct. 718, 731

(2019) (vacating death sentence and remanding for "renewed consideration" of defendant's competency where Supreme Court was "uncertain" about basis for decision). As Judge Ryan has retired, this Court should order a remand for resentencing rather than a limited remand. *See United States v. Branham*, 515 F.3d 1268, 1270 (D.C. Cir. 2008). *Second*, regardless of the judge's finding, Malvo's as-applied challenge succeeds because the record amply demonstrates his corrigibility. *See Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (per curiam) (reversing death sentence where "on the basis of the trial court record, Moore has shown he is a person with intellectual disability."). *Third*, under Article 25, the judge's failure to make a finding of *incorrigibility* necessitates a resentencing. Appellant's Br. at 56–57.

B. Malvo's sentencing violated *Miller*'s procedural requirements.

Malvo's sentencing reflected its time. Judge Ryan did not even mention that Malvo was a juvenile at the time of his offenses, let alone address the "immaturity" that diminishes the culpability of all juveniles. *Miller*, 567 U.S. at 477; *see also United States v. Delgado*, 971 F.3d 144, 159 (2d Cir. 2020) (remanding for resentencing where "court did not reference [defendant's] age at all, much less grapple with it."). And it is difficult to imagine a post-*Miller* sentencer—charged with

"distinguishing" between "transiently immature" and "irreparably corrupt" juveniles, *Miller*, 567 U.S. at 479–480—condemning a juvenile who had demonstrably "changed" to die in prison. The record offers scant reason to believe that Judge Ryan considered Malvo's "youth and attendant characteristics" as mitigating. *Id*. at 483.[2]

The State does not even attempt to argue that the record shows adequate consideration of Malvo's youth. Its "complete" answer is that after *Jones*, *all* discretionary juvenile life-without-parole sentences satisfy *Miller*'s procedural rule. State's Br. at 13. Under this absolutist position, there is no need to consider *when* the sentence was imposed or *what* was considered by the sentencer.

The State is wrong for two reasons. *First*, *Jones* did not issue a blanket ratification of pre-*Miller* discretionary juvenile life-without-parole sentences. *Cf. Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) ("[W]ords of our opinions are to be read in the light of the facts of the case under discussion."). *Jones*'s post-*Miller* sentencer had the benefit of (1) *Miller*'s reasoning and (2) argument about the "hallmark features" of Jones's youth. 141 S. Ct. at 1313. Against that backdrop,

[2] The State asserts that *Roper v. Simmons*, 543 U.S. 551 (2005) provided Judge Ryan with a "blueprint" for considering "youth as a mitigating factor." (State's Br. at 22). *Roper*'s so-called "blueprint" did not direct judges in non-capital cases to consider youth as mitigating. Not surprisingly, it was not mentioned at Malvo's sentencing.

the Supreme Court held that a discretionary sentencing scheme is "constitutionally sufficient" because the "sentencer necessarily *will* consider the defendant's youth" as a "mitigating factor." *Id.* at 1313, 1319; *see also Holmes v. State*, 859 S.E.2d 475, 481 (Ga. 2021) ("presum[ing] the trial court knew and applied [*Miller*'s] holding" in a post-*Miller* sentencing). *Jones* did not suggest that pre-*Miller* sentencers in states like Maryland—who were permitted to *disregard* youth or treat it as *aggravating*—"necessarily" considered the "mitigating qualities of youth." 141 S. Ct. at 1314, 1319.[3]

Second, the State's position is inconsistent with *Jones*'s repeated affirmation of *Miller*'s "mandate[]" that sentencers in life-without-parole cases consider a child's "youth and attendant characteristics" as mitigating, 141 S. Ct. at 1311, 1314, 1316 (all quoting *Miller*, 567 U.S. at 483), and afford "individualized" consideration to their "diminished culpability and heightened capacity for change." *Id.* at 1316. *Jones*, therefore, did not alter what judges must *consider* under *Miller*, but rather clarified, in a post-*Miller* context, that a sentencing explanation was not necessary to ensure "actual consideration" of youth. *Id.* at

[3] The State retorts that *Jones* did not suggest that *Miller*'s procedure "applies any differently to pre-*Miller* cases." State's Br. at 21. But the Supreme Court did not need to address this issue in considering a post-*Miller* sentence. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (Supreme Court does not "adjudicate hypothetical or abstract disputes.").

1319. In a pre-*Miller* context, adequate consideration cannot be presumed: The record must show that the judge considered the child's "youth and attendant characteristics" as mitigating.[4] As that showing cannot be made in this case, Malvo's sentencing was unconstitutional.

The State fallaciously asserts that this challenge is not cognizable under Md. Rule 4-345(a) because it raises mere "procedural defects." State's Br. at 16–17. *First*, Malvo's right to a *Miller*-compliant sentencing proceeding is integrally linked to his substantive rights under the Eighth Amendment and Article 25. *See Montgomery*, 577 U.S. at 210 (*Miller* hearing is a procedural requirement that "*gives effect to*" and is "*necessary to implement [the] substantive guarantee*" that "life without parole is … excessive" for transiently immature juveniles) (emphases added). Malvo's claim thus appears to be categorically different from *every* claim classed as "procedural" by this Court in denying Rule 4-345(a) review. *See*, *e.g.*, *Bailey v. State*, 464 Md. 685, 693 (2019) (failure to give timely subsequent offender notice); *Hoile v. State*, 404 Md. 591, 623 (2008) (failure to permit victim to

[4] Thus, in post-*Jones* cases that affirmed pre-*Miller* discretionary life-without-parole sentences, the sentencer was either *required* to consider, or *explicitly* considered, youth as mitigating. *See, e.g.*, *White v. State*, 499 P.3d 762, 767 (Okla. Crim. App. 2021) (life-without-parole sentence imposed after *capital* jury considered defendant's "youth and its attendant characteristics" as mitigating); *Harned v. Amsberry*, 499 P.3d 825, 833 (Or. Ct. App. 2021) (sentencer acknowledged defendant's "youth is a mitigating factor").

speak at sentencing). *Second*, *Montgomery*—a challenge to a Louisiana sentencing proceeding—was brought as a motion to correct illegal sentence under a mechanism identical to Rule 4-345(a). 577 U.S. at 195–196. *Finally*, and in the alternative, an exception to Rule 4-345(a)'s general principles applies where "alleged error[s] of constitutional dimension" subsequently recognized by the Supreme Court "may have contributed to the imposition of the death sentence." *Baker v. State*, 389 Md. 127, 134–135 (2005). Malvo's claim that constitutional errors first recognized in *Miller* contributed to the imposition of life without parole—a penalty akin to death for juveniles—falls within the scope of Rule 4-345(a). *See* Appellant's Brief at 57 n.12.

C. Malvo's sentences are disproportionate under Article 25 because juvenile life without parole is "cruel" or "unusual" punishment.

Article 25 affords juvenile offenders broader protection than the Eighth Amendment. *First*, its prohibition—"cruel *or* unusual punishment"—has a broader sweep than the Eighth Amendment's, and its history suggests that this was deliberate. MacArthur Br. at 7–13. The State cites a law review article suggesting that the word "unusual" in the Eighth Amendment may have historically had "no independent meaning." State's Br. at 43 (citation omitted). This is a minority view: "Scholars have *most commonly* read the Eighth Amendment" to

"proscribe punishments that are *both* cruel and unusual." William W. Berry III, *Unusual State Capital Punishments*, 72 Fla. L. Rev. 1, 19 & n.142 (2020) (collecting authorities) (emphases added); *see also Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (Scalia, J., plurality opinion) ("[A] disproportionate punishment can perhaps always be considered 'cruel,' but it will not always be (as the text also requires) 'unusual.' ").[5] And it is "inconceivable that the framers … merely intended to add surplusage to the [Maryland] Constitution." *Brown v. Brown*, 287 Md. 273, 287 (1980).

Second, Maryland's distinct legislative tradition of exceeding the federal constitutional floor in protections for juvenile offenders should be reflected under Article 25. The State responds that a statutory tradition "does not mean that every conceivable limitation is constitutionally required." State's Br. at 44. True, obviously. But "pre-existing state law," including statutory law, "may also suggest distinctive state constitutional rights." *State v. Hunt*, 450 A.2d 952, 965 (N.J. 1982) (Handler, J., concurring); *see also State v. Bassett*, 428 P.3d

[5] Delaware, which based its 1776 "cruel or unusual punishments" bar on Maryland's provision, found it necessary to eliminate the word "unusual" in 1792. *See* Casey Adams, *Banishing the Ghost of Red Hannah: Proportionality, Originalism, and the Living Constitution in Delaware*, 27 Widener L. Rev. 23, 29, 42–44 (2021) (arguing that this amendment was intended to change the provision's meaning).

343, 350 (2018) (abolishing juvenile life without parole under state constitution, in part, because of legislature's "ongoing concern for juvenile justice issues.") (citation omitted).

Third, this Court should join the other state supreme courts that have interpreted their Eighth Amendment analogues to afford broader protections to juveniles. MacArthur Br. at 14–19. Maryland has a particular need for these protections given that it has some of the nation's worst racial disparities in juvenile sentencing. JLC Br. at 7–11. The State's argument (State's Br. at 41–43) that this Court "dismissed" broader protections under Article 25 in *Thomas v. State*, 333 Md. 84 (1993) is baseless: *Thomas* held that "*[b]ecause* the *prevailing* view of the Supreme Court recognizes … a proportionality component in the Eighth Amendment"—mirroring Article 25's proportionality requirement[6]—"we perceive no difference between the protection afforded" by those provisions. *Id.* at 96, 103 n.5 (emphases added). *Thomas* thus implied that it *would* have interpreted Article 25 more broadly if the Supreme Court's "prevailing" view was different. MacArthur Br. at 13–14. And nothing in the opinions in *Trimble v. State*, 300 Md. 387 (1984) or *Carter v. State*, 461 Md. 295 (2018)—or in

[6] Article 25's proportionality requirement was first recognized in *Mitchell v. State*, 82 Md. 527, 533–534 (1896), 14 years *before* the Supreme Court adopted this limitation in *Weems v. United States*, 217 U.S. 349 (1910).

the briefs filed in those cases—suggests that Petitioners sought *greater* protections for juvenile offenders under Article 25.

This Court thus has a clean slate to interpret Article 25 more protectively of juvenile offenders. It should start by invalidating Maryland's few remaining juvenile life-without-parole sentences because they are "cruel" or "unusual." With respect to "cruelty," the State does not offer any legitimate penological purpose for juvenile life without parole or argue that it comports with contemporary standards of decency. Instead, it argues that these sentences are "not cruel post-JUVRA" because there is now an opportunity for modification. (State's Br. at 45–46). JUVRA, however, does not: (1) invalidate these unconstitutional sentences; (2) eliminate the rehabilitative disadvantages associated with these sentences; or (3) provide a meaningful opportunity for release from these sentences. Appellant's Br. at 15–17; Argument II, *infra*. Juvenile life without parole thus remains "cruel" under Article 25.

These sentences are also "unusual": Only 11 Maryland inmates are serving this penalty, and the last was sentenced in 2002. Affidavit of Jay E. Miller at 6. The State speculates that the "fact that only a handful of people are serving this sentence in Maryland means that it is being deployed constitutionally." State's Br. at 46–47. But the

"infrequen[cy]" of a punishment is compelling evidence of a "consensus against its use." *Graham*, 560 U.S. at 62 (collecting cases). And this Court need not defer (State's Br. at 47–48) to the Legislature's decision to only ban these sentences prospectively: It is "difficult to imagine" a "weaker" "argument for legislative deference" than with respect to a punishment that has been rarely imposed and "abolish[ed] … for all future crimes." *State v. Santiago*, 122 A.3d 1, 84 (Conn. 2015).

II. JUVRA does not cure Malvo's unconstitutional sentences.

Maryland must provide Malvo a meaningful remedy for his six unconstitutional life-without-parole sentences in Maryland. *See Montgomery*, 577 U.S. at 204 ("There is no grandfather clause that permits States to enforce punishments the Constitution forbids."); *Litz v. Maryland Dept. of Environment*, 446 Md. 254, 275 (2016) ("Article 19 of the … Declaration … [requires] that a plaintiff injured by unconstitutional state action … have a remedy to redress the wrong.") (citation omitted). There are two possible remedies under the Eighth Amendment and Article 25: (1) vacating these sentences and remanding for resentencing; or (2) providing Malvo a "meaningful opportunity to obtain release [from these sentences] based on

demonstrated maturity and rehabilitation." JUVRA does not provide Malvo that "meaningful opportunity" for three independent reasons.

First, JUVRA is unlikely to provide Malvo *any* opportunity for release from his Maryland sentences because he faces long odds of (1) being paroled by Virginia and (2) serving the requisite 20 years in Maryland to qualify for a hearing. JUVRA thus offers him, at best, a "remote possibility" of presenting his maturity and rehabilitation to a Maryland judge. *Cf. Graham*, 560 U.S. at 70 (distinguishing between "meaningful opportunity" and "remote possibility"). Too bad, says the State: "[T]he fact that Malvo may never have an opportunity to serve his Maryland sentences is irrelevant to whether those sentences are legal." State's Br. at 40. To be clear: Malvo's Maryland sentences are unconstitutional—and illegal—*independent* of his Virginia sentences. JUVRA cannot cure this illegality unless it provides Malvo a *meaningful*—rather than a theoretical—opportunity for release from those sentences. Because of Virginia's sentences, Malvo's opportunity for release under JUVRA is purely speculative. The only constitutionally-adequate remedy available is a resentencing.

Second, Malvo's "stacked sentence" means that even if he enters Maryland custody and is incarcerated for 20 years, he will likely not be able to receive review of *all* of his unconstitutional Maryland life-

without-parole sentences. Appellant's Br. at 61–62. Assuming that is the case, JUVRA provides an *incomplete* remedy: Malvo will not have a "meaningful opportunity to obtain release" from *each* of his unconstitutional sentences. The State's response (State's Br. at 34–36) misses the mark: Malvo is not arguing that six 20-year terms under JUVRA cumulatively constitute a *de facto* life-without-parole sentence, but rather that JUVRA is at best a *partial* cure for his constitutional injuries. A resentencing is the only way to ensure him six constitutional sentences.

Third, JUVRA does not resolve Malvo's claims because it does not afford him a "meaningful opportunity to obtain release *based on* demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75 (emphasis added). An opportunity for release that is "based on" demonstrated maturity and rehabilitation *either* "ensures" that "matured" juveniles are "not … forced to serve" life sentences, *Montgomery*, 577 U.S. at 212 (emphasis added), or makes maturity the central or foundational consideration. *See Base*, Merriam-Webster (2022), available: https://www.merriam-webster.com/dictionary/base#h2 (defining the transitive verb "base" as "to find a foundation … for"). JUVRA does neither. A juvenile who has "demonstrated maturity [and] rehabilitation … sufficient to justify a sentence reduction" is not

"ensure[d]" release because the court must deny the motion if that "better serve[s]" the "interests of justice." *See* NACDL Br. at 28–29. And demonstrated maturity and rehabilitation—far from being central or foundational—is one of eleven statutory factors. The court is not directed to give it any more weight than the "nature of the offense," "any statement offered by a victim," and "any other factor the court deems relevant." JUVRA's review mechanism, on its face, falls short of providing a "meaningful opportunity" under the Eighth Amendment and Article 25.

The State has two responses. *First*, it asserts that the JUVRA factors "effectively encompass the same [parole] criteria" approved in *Carter*. State's Br. at 29–30. In *Carter*, however, the applicable parole laws did not give the Parole Commission or the Governor sweeping discretion to base their ultimate determinations on the "interests of justice." Here, unlike in *Carter*, the concern is not that the decision-maker may "pay lip service" to the applicable criteria, 461 Md. at 346 n.34, but rather that the dispositive criterion is inconsistent with the "meaningful opportunity" requirement.

Second, the State argues that courts are "presumed to know the law and apply it correctly," which means "properly exercising discretion when considering the interests of justice." State's Br. at 31. This Court

cannot presume that a court will base its decision on "demonstrated maturity and rehabilitation" when it is directed by statute to base its decision on the "interests of justice." *Cf. Gray v. State*, 388 Md. 366, 382 n.7 (2005) (noting that this Court has "interpreted" the "interests of justice" "to include a wide array of possibilities."). And even assuming that a JUVRA denial can be appealed, State's Br. at 31 n.8, appellate review is an inadequate safeguard because Malvo may never have a JUVRA hearing.

JUVRA does not satisfy the "meaningful opportunity" requirement under the Eighth Amendment or Article 25 unless its "interests of justice" standard is interpreted to either require relief for matured juveniles or make maturity the central consideration. These interpretations depart from JUVRA's plain language: The Legislature chose to give the court expansive "interests of justice" discretion, rather than guaranteeing relief for matured juveniles, and made "demonstrated maturity and rehabilitation" one of eleven factors rather than the central consideration. This Court need not rewrite JUVRA to comport with constitutional requirements. For the vast majority of juvenile offenders, parole provides the constitutionally-required meaningful opportunity for release: JUVRA is an additional mechanism that need not meet this standard. For the 12 juvenile

offenders that are ineligible for parole, any constitutional defects in their sentencings are cured by resentencings, rather than JUVRA.

CONCLUSION

Malvo's life-without-parole sentences are unconstitutional under the Eighth Amendment and Article 25 because he is corrigible (Argument I.A, *supra*) and a juvenile offender (Argument I.C, *supra*). He must be resentenced and provided a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Alternatively, he should finally receive a *Miller*-compliant sentencing hearing (Argument I.B, *supra*) where the court determines whether he should have such a "meaningful opportunity."[7]

Respectfully submitted,

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[7] If this Court or the resentencing court determine that Malvo is entitled to a "meaningful opportunity for release," he will argue at his resentencing that he should not receive a "stacked sentence" that denies him "hope for some years of life outside the prison walls." *See Carter*, 461 Md. at 356–357, 364. If the resentencing court determines that Malvo is not entitled to that "meaningful opportunity," it has *carte blanche* to impose a stacked sentence.

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3900 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

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